UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DAKOTA RESOURCE COUNCIL, a non-profit North Dakota corporation, Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, Respondent.	)	No. _____ **Petition for Review**

Pursuant to Section 307 of the Clean Air Act, 42 U.S.C. § 7607, and the Administrative Procedure Act, 5 U.S.C. § 702, 704 and 706, Petitioner Dakota Resource Council, on behalf of itself and its members, hereby petitions the Court for review of a final agency action taken by Respondent Environmental Protection Agency on February 24, 2004.

The final action challenged by this petition for review is EPA Administrator Michael O. Leavitt's formal execution, on February 24, 2004, of a "Memorandum of Understanding Between the State of North Dakota and the United States Environmental Protection Agency" (herein "MOU," attached as **Exhibit A**). The MOU adopts fundamental changes to well-established federal law and policy regarding the determination of air pollution impacts in national parks and wilderness areas. The MOU represents a final agency action. In other words, the MOU is an agency pronouncement which is "controlling in the field," and which represents the culmination of EPA's decisionmaking process where both "rights and obligations have been determined" and from which "legal consequences will flow." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-22 (D.C. Cir. 2000). Nevertheless, the MOU was signed by EPA without following notice and comment rulemaking procedures consistent with the Administrative Procedure Act.

The MOU, on its face and in practice, is contrary to the Clean Air Act, EPA regulations issued pursuant to the Clean Air Act, and long-standing agency policy. That the MOU is

contrary to established EPA law and policy is supported by an electronic letter to Administrator Leavitt's air quality directors from every EPA regional office in the country asking that North Dakota's revised modeling protocol, based on and allowed by the MOU, "be rejected." That letter, dated April 21, 2004, is attached hereto as **Exhibit B**.

According to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), a petition for review of a final action taken by the Administrator of EPA that is "locally or regionally applicable" may be filed in the appropriate circuit within 60 days after the date the action is published in the Federal Register. EPA has not published notice in the Federal Register of its execution of the MOU consistent with Section 307(b) of the Clean Air Act. EPA may nevertheless in the future attempt to claim its action was final and that Petitioner is precluded from challenging the provisions or consequences of the MOU in a later proceeding. Therefore DRC is filing this petition within 60 days of the day the EPA Administrator signed the MOU.

Well before the initiation of this action the Dakota Resource Council asked EPA whether it will take the position that the MOU is not a final agency action. EPA stated that it would not provide an opinion to the Dakota Resource Council on this issue. By this method the agency seeks to have it both ways. If the MOU is challenged within the 60-day appeal period EPA may claim judicial review is inappropriate because the MOU is not a final agency action. If the MOU is challenged after the expiration of the 60-day period EPA may claim the MOU is a final agency action to which judicial review is foreclosed. Thus Dakota Resource Council's only choice was to seek review of the MOU now.

Dated: April 26, 2004.

FOR PETITIONER DAKOTA RESOURCE COUNCIL

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Laramie, WY 82070
307-745-7979

CERTIFICATE OF SERVICE

I certify that on this 26th day of April, 2004, I caused to be delivered by hand to the Court Clerk, and by United States Mail to the other addressees below, a true and correct copy of the foregoing Petition for Review and Exhibits:

Office of the Clerk
United States Court of Appeals
Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 S. 10th Street
St. Louis, MO 63102

Michael O. Leavitt
Administrator
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

Lyle G. Witham
Assistant Attorney General
North Dakota Attorney General's Office
500 North 9th St.
Bismark, ND 58501

Mr. John Ashcroft
Attorney General
Department of Justice
10th and Constitution, N.W.
Room 4400
Washington, D.C. 20460

Daniel Pinkston
United States DOJ
Environmental Defense Section
N Tower
999 18th Street, Suite 945
Denver, CO 80202-2449

Reed Zars

Exhibit A

MEMORANDUM OF UNDERSTANDING BETWEEN THE STATE OF NORTH DAKOTA AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

The State of North Dakota (State) and the United States Environmental Protection Agency (EPA) enter into this memorandum of understanding (MOU) to identify a process for resolving several issues relating to the modeling protocol for the State's Prevention of Significant Deterioration (PSD) program.

Recitals

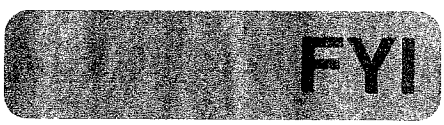
1. The State has an EPA-approved State Implementation Plan (SIP) under the Clean Air Act. (CAA) 40 C.F.R. Part 52, §§ 1820-1835. The State's SIP includes authority to administer the State's Prevention of Significant Deterioration (PSD) program, which was originally approved by EPA on May 26, 1977, (42 Fed. Reg. 26,977) and since then has been administered by the state under its SIP.

2. The State recently completed an 18-month long periodic review of its PSD program and determined that there are currently no PSD Class I sulfur dioxide increment violations occurring in North Dakota or Eastern Montana, and that the State's SIP is adequate to protect against air quality deterioration. September 8, 2003 Order of North Dakota State Health Officer Terry L. Dwelle, M.D. In January 2002, EPA prepared a "Draft Dispersion Modeling Analysis of PSD Class I Increment Consumption in North Dakota and Eastern Montana," which tentatively identified increment violations. Similarly, on May 23, 2003, EPA published a "Notice of Availability" of the May 2003 EPA Dispersion Modeling Analysis, which also tentatively identified increment violations. However, both EPA reports sought public comment and explained that they were not final agency determinations.

3. The State agrees to do draft alternative modeling based on the issues on which the State and EPA agree. By agreeing to do this draft modeling, the State and EPA agree that the State is neither re-opening its PSD periodic review determination, nor agreeing to waive or alter any of the legal or factual determinations the State made in that proceeding. EPA likewise is not agreeing to be bound by the draft modeling the State conducts under this MOU , but only to weigh the results in any decision it makes to either concur or not concur with the State's September 8, 2003 determination, or to revise, finalize, or not finalize the draft modeling EPA has published for public comment.

I. Issues of Agreement

The State and EPA agree that the State has the following discretion under the CAA and



its implementing rules, and that the State may choose these options in conducting the additional modeling it has agreed to do under this MOU :

1. The State may use versions of CALMET and CALPUFF acceptable under 40 C.F.R. Part 51, Appendix W, as amended at 68 Fed. Reg. 18440 (April 15, 2003).

2. When establishing the baseline emission inventory for sources existing on the minor source baseline date, the State may use the "actual emissions" from "a different time period" other than "a two-year period which precedes" the minor source baseline date upon a determination that the different time period "is more representative of normal source operation."

3. The State may use emission factors based on recent continuous emission monitoring (CEM) data to estimate baseline emissions for electric utilities if adjusted for the actual contents of the coal used in the baseline period and provided they are consistent with other data sources for the facility. The State agrees to use sulfur-content of the coal consumed during a unit's baseline normal source operations, rather than average life of mine sulfur content, in modeling conducted under this MOU.

4. Consistent with the CAA and promulgated EPA and North Dakota regulations. the State may use actual emissions as defined by rule in estimation procedures for short-term time periods for all sources.

5. The State may model the baseline emission inventory and the current emission inventory to determine estimated baseline concentrations and estimated current concentrations. This procedure may be used to determine estimated changes in contaminant concentration "over the baseline concentration" in the ambient air, and to assist in examining the correspondence between modeling and monitoring in any accuracy analysis. Alternatively, the State may model the ambient concentration change attributable to increment-affecting emissions.

6. The State may model five years of representative mesoscale meteorological data, such as National Weather Service (NWS) upper-air/hourly-surface data. Alternatively, the State may model three years of mesoscale meteorological data suitable for CALMET, such as advanced MM5 or Rapid Update Cycle data, as input data for the CALPUFF air quality model in conjunction with appropriate available standard NWS or comparable meteorological observations within and near the modeling domain. Processing of prognostic meteorological data sets must be made available to EPA .

II. Issues That Remain Unresolved

The State and EPA have not reached agreement on the following issues:

1. Whether to include emissions of sources granted Federal Land Manger variances under CAA § 165 when determining consumption of the PSD Class I sulfur dioxide increment.

2. Whether the specific alternative method of calculating air quality deterioration and PSD increment consumption from model outputs as used by the State is consistent with the CAA and promulgated EPA regulations.

The Parties will continue to evaluate these issues, and continue to engage in a technical dialogue to resolve them. The State is not waiving its determination on these issues in its periodic review by agreeing to do draft modeling for PSD compliance based only on the Issues of Agreement summarized in subdivision I above. Without waiving its position on these two issues, the State agrees to do draft modeling contemplated by this MOU, consistent with EPA's position on these two issues, and draft modeling consistent with the State's position on these two issues.

III. Process and Timetables

The State and EPA further agree:

1. In order to conduct the draft modeling identified by this MOU, the State will propose a draft alternative modeling protocol for EPA's comment and review no later than 15 days after this MOU's execution. EPA will review and provide written comment to this proposed modeling protocol within 30 days following receipt of the alternative modeling protocol. The State will finalize this modeling protocol for draft modeling, consistent with this MOU no later than 45 days following receipt of EPA's comments.

2. The State will conduct a draft modeling run, based upon the alternative modeling protocol, no later than 75 days after the finalized protocol is received by EPA. By doing this draft modeling, the State is not re-opening its PSD periodic review determination, or waiving any of the legal or factual determinations the State made in that proceeding. Nor is EPA agreeing to be bound by the modeling the State conducts under this MOU, but only to weigh the results.

3. Air quality monitoring data is a significant indicator of air quality in Class I and Class II areas and will be used to evaluate the draft modeling results and to guide any adjustments in the modeling protocol if appropriate, so that modeling results are consistent with that data.

4. Any federally enforceable future reductions in emissions may be considered in the modeling to determine future compliance. The modeling protocol may model

possible future reductions to measure PSD increment compliance if such reductions are made federally enforceable.

5. To work in good faith (a) to achieve the goals and timetables agreed to in this MOU, (b) to preserve and protect the existing air quality of the State, including its Class I areas, and (c) to provide increased regulatory certainty to existing and future permitted facilities.

6. The State or the EPA may terminate this MOU without prior notice or cause by providing written notice to the other of its intent to terminate.

Michael O. Leavitt
Administrator, EPA

Feb 24, 2004
Date

John Hoeven
Governor, State of North Dakota

Feb. 24, 2004
Date

Exhibit B

Dennis Atkinson
04/21/04 03:50 PM

To: Peter Tsirigotis/RTP/USEPA/US@EPA, Dave Svendsgaard/RTP/USEPA/US@EPA
cc: Tyler Fox/RTP/USEPA/US@EPA, Mark Evangelista/RTP/USEPA/US@EPA, Brian Hennessey/R1/USEPA/US@EPA, Alan Cimorelli/R3/USEPA/US@EPA, Annamaria Coulter/R2/USEPA/US@EPA, Stanley Krivo/R4/USEPA/US@EPA, Randall Robinson/R5/USEPA/US@EPA, Quang Nguyen/R6/USEPA/US@EPA, Richard Daye/ARTD/R7/USEPA/US@EPA, Kevin Golden/P2/R8/USEPA/US@EPA, Carol Bohnenkamp/R9/USEPA/US@EPA, Scott Bohning/R9/USEPA/US@EPA, Denny Lohman/R3/USEPA/US@EPA, Brenda Johnson/R4/USEPA/US@EPA, Mary Portanova/R5/USEPA/US@EPA, Ian Cohen/R1/USEPA/US@EPA, Bret Anderson/ARTD/R7/USEPA/US@EPA, Rob Wilson/R10/USEPA/US@EPA, Herman Wong/R10/USEPA/US@EPA, don_shepherd@nps.gov, John_Notar@nps.gov, John_Bunyak@nps.gov, Susan_Johnson@nps.gov, tim@den.nps.gov, John Irwin/RTP/USEPA/US@EPA
Subject: ND MOU - Regional Modeling Contacts perspective

Bill Harnett
Director, Information Transfer and Program Integration Division

Peter Tsirigotis
Director, Emissions, Monitoring, and Analysis Division

The Regional air quality modelers are concerned about the North Dakota Memorandum of Understanding (MOU) dated 24 February 2004 and the associated 9 March 2004 draft North Dakota alternate modeling protocol. These documents incorporate substantial changes from past air quality modeling guidance (40 CFR Part 51, Appendix W) and accepted methods, and could set a precedent for analyses in other Regions.

The purpose of this document is to provide a national perspective on the procedures in the proposed North Dakota alternate modeling protocol. Basically, we agree with most of the principles raised in Items I through VI contained in Region 8's document "EPA Comments on North Dakota Department of Health's Proposed Determination Regarding The Adequacy of the SIP to Protect PSD Increments For Sulfur Dioxide", May 24, 2002 ("2002 comments"). Rather than repeat details on all of the issues, which were well-covered in the 2002 comments, this e-mail just states them in summary form.

I. Even if appropriate ambient monitoring is available, it is not a sufficient replacement for modeling in assessing PSD increment impacts. Unlike modeling it cannot distinguish between sources that consume increment and those that do not, it cannot provide full spatial and temporal coverage, and it cannot provide assurance that impacts will remain low as the meteorological conditions vary from year to year. Furthermore, the MOU seems to allow the use of monitoring data to calibrate modeling concentrations. According to 40 CFR Part 51 Appendix W, Section 8.2.11, "Therefore short term model calibration is unacceptable."

II. Variances can be provided by Federal Land Managers for sources that violate the Class I increments but do not negatively affect Air Quality Related Values. But a source with a variance still consumes increment; its emissions must therefore be included in impact analyses for other sources.

III. Compliance of peak emissions with a 3-hour or 24-hour average increment and NAAQS cannot be assessed by averaging in lengthy periods with lower emissions. Using annual emissions for short-term impacts artificially reduces peak emissions, and is not protective of shorter-term standards.

IV. Increment consumption is determined by examining the air quality degradation due to a new source, for each modeled receptor and period, not by examining the degradation relative to the day with worst existing air quality. The latter "unpaired" procedure allows degradation of the cleanest days all the way to the condition of the dirtiest day. (See October 16, 2002 memorandum from Warren Peters, EMAD to Kevin Golden, EPA Region 8.)

V. There is no basis for averaging concentrations from different receptor locations to determine overall impact. Impacts vary in space, and averaging has the effect of artificially reducing the maximum modeled impact.

VI. Baseline emissions are based on actual emissions during the baseline year, except for rare and unusual circumstances such as a labor strike or major equipment failure. Other years or operating conditions may need to be considered, but only insofar as they yield a better estimate of what actual emissions were at the baseline date. Other procedures, such as selecting years based on how high their emissions are, or what was "normal" later, can artificially inflate the baseline, and so artificially expand the available increment.

The baseline is defined in terms of actual emissions contributing to the air quality at the baseline date. For large groups of minor sources, such as the hundreds of oil and gas sources in the protocol study area, it is unlikely that they will actually all be operating simultaneously. Assuming that they are would artificially inflate the baseline and available increment.

These principles are long-standing in federal regulations and in EPA guidance and practice, and have served to protect and enhance air quality. While there is certainly room for improvement in the air program, fundamental changes in the way air quality impacts are assessed require broad discussion, and in some cases changes in guidance and regulations. Therefore, the draft protocol should be rejected insofar as it deviates from these principles. In addition, while "Memorandum of Understanding Between the State of North Dakota and the United States Environmental Protection Agency", dated February 24, 2004 may not explicitly commit EPA to accepting such deviations, it seems to open the door to them.

We hope that the principles and regulatory requirements stated above will be upheld in the decision on the North Dakota protocol, consistent with current EPA guidance, regulations, and practice.
Sincerely,

Air quality modelers of EPA Regions 1, 2, 3, 4, 5, 6, 7, 9, 10

Note: Region 1 does not agree with the use of the word "increment" in the first sentence of Item #3.